Perbadanan Pembangunan Ekonomi Sarawak v Sarawak Motor Industries Bhd

HIGH COURT (KUCHING) - SUIT NO KG 73 OF 1988
HAIDAR J
22 APRIL 1989

Banking - Notice issued to remedy default - Default not remedied - Claim for full amount outstanding - Whether loan agreement repudiated - Whether notice valid

Civil Procedure - Summary judgment - Application to strike out claim - Whether issues complex and involved - Affidavit to condescend upon particulars - Rules of the High Court 1980, O 14, 18 & 32

The plaintiffs filed an application under O 14 for judgment against the defendants. On their part, the defendants took out an application under O 18 and the inherent jurisdiction of the court to strike out the plaintiffs' action. In a previous suit between the same parties relating to the same subject matter except for the amount claimed, the plaintiffs' application for summary judgment was dismissed. Leave was granted to discontinue that suit with liberty to file a fresh action. In the present suit, the plaintiffs alleged that a notice was sent to the defendants giving them 30 days to settle the instalments and interests due. The defendants failed to settle the said instalments and interests, and accordingly, the plaintiffs by a letter demanded full settlement of all the amounts outstanding including accrued interest. The defendants failed and/or refused to settle the amount claimed and the plaintiffs filed this suit and took out an application for summary judgment. The defendants opposed the application on three grounds; (i) there was repudiation on the plaintiffs' part; (ii) the notice of demand was invalid, and (iii) there was no basis for the interest claimed.

Held, allowing the plaintiffs' application and dismissing the defendants' application:

(1) The loan agreement allowed the defendants to remedy the defaults within 30 days from notice, and where the defaults were remedied, the defendants would be restored to their original rights. However, the defendants admitted by their letter that they were unable to remedy the default and were clearly in breach of the loan agreement. The plaintiffs rightfully invoked the powers under the loan agreement to demand the defendants to remedy the default and since the defendants were unable to do so, the plaintiffs demanded all the sums outstanding subsequently. The notice of recall pursuant to a provision in the loan agreement cannot amount to a repudiation as the plaintiffs were merely exercising their rights as agreed in the event of a breach by the defendants.

(2) There was no evidence either by correspondence or conduct of the plaintiffs to show that the plaintiffs were repudiating the contract. The notice of demand was not invalid since the contract was not so repudiated, and there was no dispute as to the amount claimed under the notice.

(3) The affidavit affirmed on behalf of the defendants did not condescend into particulars as to how or why the interest claimed was without any basis, and it contains no more than a bare denial. It is one of the established principles in an application under O 14 that the affidavit showing cause must condescend upon particulars.

[*Editorial Note*: The defendants have appealed to the Supreme Court vide Civil Appeal No 02-292 of 1989.]

Cases referred to

1 *Tan Hock Chan* v *Kho Teck Seng* [1980] 1 MLJ 308 (distd)
2 *Esso Standard Malayan Bhd* v *Southern Cross Airways (M) Bhd* [1972] 1 MLJ 168 (folld)

Legislation referred to

Rules of the High Court 1980 O 14, 18, 32

Christina Eng (Ms) for the plaintiffs.
Chew Pok Oi for the defendants.

Cur Adv Vult

Haidar J: There are two summons-in-chambers filed in this Suit No KG 73/1988, one by the plaintiffs (encl 10) under O 14 of the Rules of the High Court ('RHC') to enter judgment against the defendants for the sum of $7,803,844 with interest thereon at the agreed rate of 8.75% pa from 1 January 1988 until full payment and costs of this action including the cost of this application to the plaintiffs in any event and the other by the defendants (encl 13) under O 18 r 19 of the RHC and under the inherent jurisdiction of the court for an order that the plaintiffs' statement of claim be struck out and that the plaintiffs' action against the defendants be stayed or dismissed and that the defendants be at liberty to enter judgment for their costs, including the cost of this application to be taxed. Both counsels agreed that the two summons-in-chambers could be heard together by the court.

For the purpose of this judgment, I am of the view that it is more convenient for me to deal with the plaintiffs' application first as the decision may have a bearing on the defendants' application. However, before proceeding to consider the plaintiffs' application it is appropriate and relevant to give and consider the background facts of another Suit No KG 273 of 1986 between the same parties relating to the same subject matter except for the amount now claimed by the plaintiffs wherein the plaintiffs' application for summary judgment under O 14 was dismissed by Tan Chiaw Thong J. As a result of the dismissal of the plaintiffs' application, the plaintiffs elected to seek leave of the court to discontinue wholly Suit No KG 273/1986 against the defendants with liberty to file a fresh action in respect of their claim in the said action and which leave was accordingly granted by Tan Chiaw Thong J (see exh 'RK3' in encl 14).

In Suit KG 273/1986 the defendants in their defence relied on:

(a) the validity of the notice of demand;
(b) alleged repudiation on the part of the plaintiffs;
(c) estoppel.

The court ruled that there were triable issues of fact and law in respect of defences (a) and (c) but as to defence (b)

the court held that the alleged repudiation was never accepted by the defendants and neither had the defendants treated the loan agreement as at an end (see p 4 of the judgment dated 30 September 1987).

As regards the issue on the validity of the notice of demand, Tan Chiaw Thong J held that there was a triable issue because of the defect relating to the amount the subject matter of the default notice which is not altogether clear and one which is unarguable (see p 3 of the judgment).

In respect of the estoppel issue, Tan Chiaw Thong J, said that the defendants succeeded in raising triable issues of fact and law as to whether, at the time of the institution of the action, the negotiations between the parties were still going on, which negotiations had started before the institution of the action; and if so, whether it has the effect of suspending the operation of the notice NG-2 and the written demand NG-4 (see p 10 of the judgment).

In the present application of the plaintiffs, the plaintiffs filed this Suit No KG 73/1988 on 15 April 1988 where according to para 7 of their statement of claim, by a notice dated 18 January 1988 despatched by prepaid AR registered post to the defendants the plaintiffs gave the defendants 30 days from the date of receipt of the said notice to settle the instalments due for $4,600,000. In the same notice the defendants were duly notified that they had not settled the accrued interest totalling $903,844 as at 31 December 1987 and were duly requested to settle the said interest due. The said notice was received by the defendants on 25 January 1988. According to para 8 of the statement of claim, despite the said notice to remedy the said defaults the defendants failed to settle the said instalments and interests due. Accordingly by letter dated 21 March 1988 sent by prepaid AR registered post to the defendants the plaintiffs demanded full settlement of all the amounts outstanding including accrued interest under the said loan totalling $7,803,844, the particulars whereof were stated therein in para 8 itself. The defendants failed and/or refused to settle the said sum of $7,803,844, hence the filing of the present Suit No KG 73/88 and followed by the application for summary judgment by the plaintiffs against the defendants.

The plaintiffs' application for summary judgment is supported by the affidavit of Nicholas Gunjen affirmed on 12 May 1988 and the affidavit in reply affirmed by Nicholas Gunjen on 12 August 1988. By notice dated 12 August 1988 (encl 16) the plaintiffs also gave due notice under O 32 r 13(b) of the RHC that they would make use of two affidavits filed in Suit No KG 273/1986, namely, (i) the affidavit of Nicholas Gunjen, and (ii) the affidavit of Leslie Majoribanks both affirmed on 27 June 1987.

In the plaintiffs' application (encl 10) the following were exhibited to the affidavit of Nicholas Gunjen:

(i) the loan agreement (NG-1);
(ii) notice to the defendants to settle the instalments within 30 days and the acknowledgement of the notice (NG-2 and NG-3);
(iii) letter to the defendants demanding full settlement of all amounts outstanding including accrued interest and the acknowledgement card (NG-4 and NG-5).

The defendants through the affidavit of their secretary, Ricky Kho Teck Hock dated 10 August 1988 (encl 14) and their proposed defence (RK-4) enclosed therein opposed the plaintiffs' application for summary judgment on three grounds: (a) alleged repudiation on the plaintiffs' part; (b) validity of the notice of demand; (c) there is no basis for the interest claimed.

It would appear that whilst the issue of estoppel was successfully canvassed in Suit No KG 273/1986, it was not raised in the present action as the defendants have not filed any affidavit to rebut the statement in para 3 of the affidavit in reply of Nicholas Gunjen (encl 18) that the defendants knew and have been informed that their earlier proposal had been rejected by the plaintiffs' board of directors and that the defendants are now making use of the earlier negotiations to avoid payment. In fact according to the written submission of the counsel for the defendants, the estoppel issue is relied upon only for the purposes of their application under O 18 r 19. What the defendants did is to issue a notice under O 32 r 13(b) of the RHC to use the affidavits in Suit No KG 273/1986 (see encl 20) for the present applications.

It is not disputed here of the plaintiffs' rights to institute the present proceedings as can be seen from the order of the court in Suit No KG 273/1986, ie with liberty to file a fresh action (see RK3 in encl 14) but the defendants' contention is that the facts and the issues in Suit No KG 273/1986 and the present suit are the same. I agree that the subject matter, ie the loan agreement may be the same but the amount and the circumstances have since changed. One issue that is certainly out here is 'estoppel' for the reason as said by me earlier regarding non-rebuttal by the defendants of the statement of Nicholas Gunjen's and also the admission in the written submission of counsel for the defendants. In any event, from the proposed defence of the defendants (RK4), it is observed that estoppel was not specially pleaded as a defence either. Further, 'interest' was raised for the first time in this action and was not raised in the previous suit.

Alleged repudiation by the plaintiffs

It is to be noted that the agreement in question is a loan agreement and not any other agreement like building, goods or services. According to the agreement (NG-1), it is not disputed that a sum of $11,500,000 was loaned to the defendants by the plaintiffs and the repayments by the defendants are spelt out under 'loan repayment schedule'

to the agreement, the last payment to be on 6 October 1988. The terms and conditions of the loan are spelt out in the said agreement. Clause 10 thereof provides for 'loan recall' if any one or more of the events specified under sub-cll(a) to (i) occur provided that where the defaults are as described in sub-cll(a) to (d) only, the defendants are entitled to have the said defaults remedied by written notice from the plaintiffs giving the defendants 30 days to remedy the said defaults and where the defendants remedy the said defaults, the defendants shall be restored to their original rights under the agreement. It is clear from the letter of the defendants dated 12 May 1986 to the plaintiffs (see RK9) that the defendants admitted in para 1 thereof as follows:

> ... In view of the tight cash flow position we are unable to meet the half yearly instalment payment of $1.5m and quarterly interest payment of $178,643.84 due on 4 April 1986 and 7 April 1986 respectively. It is also envisaged that we may be defaulting future payments ...

By para 2 of the proposed defence the defendants averred:

> ... will admit that no payment in respect of the instalments particularized and due under the loan agreement dated 24 October 1980 (hereinafter referred to as 'the said loan agreement'), was effected to the plaintiffs.

In so far as the loan agreement is concerned the defendants clearly are in breach of the said agreement and the plaintiffs, in my view, rightly invoked the powers under cl 10 thereof and since the breaches fell under sub-cl (a) then under cl 10.2 the plaintiffs accordingly issued a written notice dated 18 January 1988 (NG-2) to the defendants giving them 30 days to settle the instalments unpaid up to 6 October 1987 and the interests due up to 31 December 1987. If the defendants had complied with the said notice then the defendants would be restored to their original rights under the loan agreement, that is, there is no longer the right of the plaintiffs to recall the whole loan. Unfortunately the defendants failed to comply with the said notice and the next logical step for the plaintiffs to take, to my mind, is to issue a letter of demand dated 21 March 1988 to the defendants to demand all sums outstanding under the loan together with interests after the expiry of the one-month period given to the defendants to settle the arrears of instalments and interests due. Again the defendants did not respond to the said letter of demand and the plaintiffs filed this action accordingly. Can it then be said that the plaintiffs repudiated the contract when the plaintiffs were merely asserting their rights under the loan agreement? I am therefore unable to accept the defendants' contention that the contract had been repudiated by the plaintiffs and accepted by them and therefore the contract had come to an end. If the contention of the defendants' holds good, it will definitely put a lot of bank loan agreements at risk. To put it bluntly, the defendants merely for their own convenience raised the issue of repudiation in order to avoid their legal obligations under the loan agreement to pay up the loan which they admitted they would have difficulty in complying. I am of the opinion that notice of recall pursuant to a provision in the loan agreement cannot amount to a repudiation as the plaintiffs are merely exercising their rights, as agreed under the agreement, in the event of a breach or breaches by the defendants as prescribed in the loan agreement.

If I am wrong in my view that repudiation is inapplicable in this loan agreement, I will then have to consider whether there is in fact a repudiation of the contract by the plaintiffs in this case and accepted by the defendants thereby bringing the contract to an end. Looking at the correspondence between the plaintiffs or plaintiffs' counsel and the defendants (see exhs RK-5, RK-6, RK-7 and RK-8) I cannot find any evidence to show that the plaintiffs are repudiating the contract. In fact the defendants take upon themselves to declare that they are accepting the plaintiffs' alleged repudiation. Neither through the conduct of the plaintiffs could it be said that the plaintiffs are repudiating the contract. In fact the plaintiffs initially entered into discussion on without prejudice basis to help out the defendants in their difficulties in the payment of the loan instalments. What are the obligations imposed on the plaintiffs under the contract? The plaintiffs are not to recall for the loan if the defendants, inter alia, keep to their instalment payments including giving a grace period of 30 days to make good such breach or breaches. Here is a case where the defendants clearly did not keep to their side of the bargain and committed breaches of the contract and now come forward to allege that the plaintiffs repudiated the contract! I do not see how and in any event I am not convinced that the defendants can successfully rely on the alleged repudiation of the contract by the plaintiffs and thereby treat the contract as at an end and now claim that as a result the notices issued by the plaintiffs are neither valid nor effective. As there is no repudiation of the loan agreement by the plaintiffs I am of the opinion that the case of *Tan Hock Chan* v *Kho Teck Seng*[1] is inapplicable and is distinguishable with the present case. The issue on alleged repudiation of the contract by the plaintiffs, in my view, fails. Having come to such a view, I do not find it necessary, therefore, to deal with the authorities cited therein by the counsels.

Validity of the notice of demand

As I have ruled earlier that there is no merit on the issue of alleged repudiation of the contract, the defendants' argument on the validity of the notice must therefore fail as the validity of the notice, if I understand the argument of the counsel for defendants correctly, is that if the contract comes to an end then the question of issuing notice does not arise which is not the case here. In the earlier suit the learned judge ruled that there is a triable issue with regard to whether the notice NG-2 is a good notice because of the defect therein relating to the amount

the subject matter of the default notice (see p 3 at the last paragraph of the judgment) whereas in the present suit there is no dispute as to the amount stated in the notice as the defendants did not make it an issue as in the previous suit other than to assert that the notice is ineffective. As breaches of the loan agreement are continuing breaches, I am of the view that the plaintiffs are entitled to issue a new notice to the defendants by invoking cl 10 of the loan agreement. The said notice and letter of demand had sufficiently complied with cl 10 of the loan agreement. This ground too fails.

Interest

The defendants contended that the interest claimed by the plaintiffs calculated to 31 December 1987 is without basis (see para 18 of the affidavit of Ricky Kho Teck Hock at encl 14). Paragraph 18 of the affidavit of Ricky Kho does not condescend into particulars as to how or why the interest claim is without any basis and it contains no more than a bare denial. It is one of the established principles in an application under O 14 that the affidavit showing cause must condescend upon particulars. Therefore there is no merit on this ground.

In my view this is a clear and straightforward case of a loan agreement whereby the full loan was advanced to the defendants by the plaintiffs and the defendants have not kept to paying the loans as agreed in the said agreement and the plaintiffs have taken the necessary steps in accordance with the provisions of the said agreement before filing the present suit. I am satisfied that there are no triable issues in this case though the defendants seemed to try to impress upon the court that the issues are complex and involved. Raja Azlan Shah J (as he then was) in *Esso Standard Malayan Berhad* v *Southern Cross Airways (M) Bhd*[2] at p 171 said:

> It is I think right that an order under RSC O 14 should be made only if the court thinks it is a plain case and ought not to go for trial. If one simply has a short matter of construction with a few documents, the court on summary application should decide what in its judgment is the true construction. There should be no reason to go formally to trial where no further facts could emerge which would throw any light upon the letters that have to be construed.

The above-quoted passage aptly fits into the present case and I would accordingly allow the application of the plaintiffs with costs. In view of my judgment of the plaintiffs' application, the application of the defendants under O 18 r 19 of the RHC must necessarily fail and the said application of the defendants is accordingly dismissed with costs.

Plaintiffs' application allowed.

Solicitors: *Anthony Liew; Chew, Jugah, Wan Ullok, Goh & Co.*

Reported by *Yap Shao Sin*

Liew Yin Yin Construction Sdn Bhd v Yata Enterprise Sdn Bhd

HIGH COURT (IPOH) - WINDING UP NO 42-33-88
PEH SWEE CHIN J
21 APRIL 1989

Civil Procedure - Winding-up petition against company - Application by motion for, inter alia, stay of proceedings or striking out of petition made by company - Notice of intention to appear on petition filed - Whether motion and notice constitute fresh steps after appearance - Rules of the High Court 1980, O 13 r 1

Companies and Corporations - Winding-up petition against company - Alleged inability to pay debts - Arbitration clause in contract between parties - Dispute as regards amount owing - Admitted amount not paid - Breach of contract alleged against petitioner - Whether petition should be stood over or struck out

The petitioner commenced winding-up proceedings against a company alleging that the company was unable to pay its debts. The company applied by motion for an order that the hearing of the petition be stayed, alternatively that it be struck out or dismissed on the ground that the disputes between the parties ought to be referred to arbitration pursuant to an arbitration clause in the contract between them. The company said that the matters in dispute were as regards the amount of money as claimed by the petitioner and the breach of contract allegedly committed by the petitioner. The petitioner claimed the sum of $478,440.49 but the company alleged that the sum owing was only $129,912.30.

The solicitors for the company had filed a 'notice of intention to appear on petition' and later filed the motion. It was submitted for the petitioner that the company had taken a step after appearance and that the very motion was such a step. It was also submitted that the notice was also such a step.

Held, striking out the petition:

(1) In view of the intended arbitration proceedings and the alleged breach of contract, the non-payment of the admitted sum of $129,912.30 was quite excusable.

(2) The argument that the motion was a further step after appearance was plainly unacceptable for the motion was the only conceivable way to compel the petitioner to observe the arbitration agreement.

(3) The argument that the notice was a step after appearance was also plainly unacceptable. A notice of intention to appear is in effect an appearance.

(4) The disputes ought to be referred to arbitration as agreed, without further ado. For the court to inquire into the disputes would amount to the court adjudicating on the disputes, thereby frustrating the very arbitration agreement which a court should normally act on.

(5) The disputes left the court speculating as to which sum was the correct sum and as to whether there was a breach of contract as alleged. The disputed allegations were ignored by the court with the result that the petitioner had failed to prove that the company was unable to pay its debts and in the circumstances it was also not just and equitable that the company be wound up. The court found that the disputes were bona fide in the circumstances.

(6) On the ground that for the matters of dispute the parties ought to be held to their original arbitration agreement, it would